MOTION FILED

AUG 20 2004

(5)

No. 03-1597

IN THE

Supreme Court of the United States

GARY D. LOCKE, Governor of the State of Washington, SAM REED, Secretary of State of the State of Washington, and THE STATE OF WASHINGTON,

Petitioners,

v.

MUHAMMAD SHABAZZ FARRAKHAN, AL KAREEM SHADEED, RAMON BARRIENTES, CLIFTON BRICENO, MARCUS PRICE, and TIMOTHY SCHAAF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THOMAS JOHNSON, *et al.* FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OUT OF TIME AND *AMICI CURIAE* BRIEF IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS OUT OF TIME

Relief Sought

Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae,* Thomas Johnson, Jau'Dohn Hicks and John Hanes (hereinafter "*amici*"), move for leave to file out of time the attached Brief of *Amici Curiae* in Support of the Respondents. All the Petitioners - Gary Locke, Governor of the State of Washington, Sam Reed, Secretary of the State of Washington, and the State of Washington have given their written consent to the filing of an *amicus* brief but express no opinion about whether the Court should permit the brief to be filed out of time. All the Respondents - Muhammad Shabazz Farrakhan, Al Kareem Shadeed, Ramon Barrientes, Clifton Briceno, Marcus Price and Timothy Schaaf have consented in writing to the filing of the brief. This motion is required because the deadline has passed for the filing of the Respondents' brief.

Interest of *Amici* in Case

Amici are plaintiffs and class representatives in *Johnson v. Bush*, No. 02-14469, pending in the United States Court of Appeals for the Eleventh Circuit. *Johnson v. Bush* is a class action challenging Florida's felony disenfranchisement law on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and that it violates Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. The Voting Rights Act claim raises precisely the same issue as

that presented by the petition for certiorari in this case. The Eleventh Circuit has granted *en banc* review of this issue, among others, and scheduled oral argument for the week of October 25, 2004. See App., *infra,* 1a-3a. *Amici's* direct interest in the question presented here is more fully described in their brief, *infra,* at 1-2.

Grounds for Granting Leave to File Out of Time

The deadline for the Respondents' brief on this petition was July 28, 2004. *Amici* learned by letter dated July 30, 2004 that the United States Court of Appeals for the Eleventh Circuit has requested the parties in *Johnson v. Bush* to focus their *en banc* briefs in part on the precise issue raised in this petition, namely whether Section 2 of the Voting Rights Act applies to felony disenfranchisement provisions.* The original Eleventh Circuit panel opinion in *Johnson v. Bush*, now vacated, held that the lower court erred in granting summary judgment to the defendants on the Voting Rights Act claim and remanded the case for trial.

Until just days before the deadline for the Respondents' brief, *amici* were preparing for trial. While a petition for rehearing *en banc* had been filed in the Eleventh Circuit by defendants on January 9, 2004, the court of appeals had not requested *amici* to respond. *See* Fed. R. App. P. 40(a)(3), 35(e). In this uncertain procedural posture, *amici*'s interest in the Petitioners'

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* The appeal in this case also involved numerous constitutional issues. Although the order granting rehearing *en banc* was issued on July 20, 2004, the Court on that date explained that counsel would be notified of further details by subsequent correspondence. The subsequent notification was provided by letter to all counsel of record dated July 30, 2004 and identified the issue raised in this Petition as one of interest to the Court. See App., *infra,* 1a.

petition for certiorari was more tenuous. Now that the Eleventh Circuit has made clear its intention to hear further argument on the precise issue raised here, however, *amici* have a more direct interest in advising the Court of their view that it is unwise to grant this petition.

The issues presented by this case are of exceptional importance to *amici* and to the class they represent. *Amici* developed an extensive factual record of the discriminatory purpose and effect of Florida's felony disenfranchisement laws in their opposition to the summary judgment motions in the district court. This Court's examination of whether Section 2 of the Voting Rights Act reaches felony disenfranchisement provisions would benefit from further development of the issues in lower courts including in cases arising from jurisdictions where such provisions originally were enacted in order to prevent black citizens from voting, and where there is significant continuing evidence of the discriminatory impact of the practice. Therefore, *amici*, respectfully seek leave of this Court to file the attached brief supporting the Respondents and urging denial of the petition for writ of certiorari.

Dated: August 19, 2004

By

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

Interest of *Amici Curiae*

Amici are plaintiffs and class representatives in *Johnson v. Bush*, No. 02-14469C, pending in the United States Court of Appeals for the Eleventh Circuit, who claim, in part, that Florida's felony disenfranchisement laws violate Section 2 of the Voting Rights Act of 1965.[1] *Amici* represent the class of all Florida citizens convicted of felonies who have completed all terms of incarceration, probation, or parole and are otherwise eligible to vote but remain barred from voting. They have a direct and substantial interest in the resolution of the issue presented for review in this petition.

Amici are uniquely situated because their claim that Florida's felony disenfranchisement provisions violate Section 2 of the Voting Rights Act is supported by significant evidence of a racially discriminatory intent motivating the original enactment. *See Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338-39 (S.D. Fla. 2002) ("Plaintiffs have present[ed] to this Court an abundance of expert testimony about the historical background of Florida's felon disenfranchisement scheme as historical evidence that the policy was enacted originally in 1868 with the particular discriminatory purpose of keeping blacks from voting."). In addition, the record in *Johnson v. Bush* includes substantial evidence of racially polarized voting, the use of voting practices and procedures that discriminate

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[1] No party's counsel authored any part of this brief. No person or entity other than the *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

against minority voters, and other evidence of relevant factors tending to show that in the totality of the circumstances felony disenfranchisement causes an inequality in the electoral opportunities of black and white voters. *See Johnson v. Governor of the State of Florida,* 353 F.3d 1287, 1306 (11th Cir. 2003), *reh'g en banc granted,* 2004 WL 1609101 (11th Cir. July 20, 2004).

Therefore, *amici* have a direct interest in ensuring that any final determination of how Section 2 of the Voting Rights Act applies to felony disenfranchisement provisions considers those states where these provisions were originally enacted with a discriminatory intent and where there is evidence of other modern barriers to equal political participation by black voters. Their claims could be affected by the Court's decision to grant certiorari in this case.

Summary of Argument

This petition for writ of certiorari should not be granted because the courts of appeals have not had the chance to complete their examination of the question presented and their further analysis could be of assistance to this Court. Currently the Court of Appeals for the Eleventh Circuit is reviewing whether Section 2 of the Voting Rights Act applies to Florida's felony disenfranchisement laws.[2] It is preferable to allow the lower courts to review the issue first rather than attempt a premature adjudication by this Court. The application of

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[2] *Johnson v. Governor of the State of Florida,* No. 02-11469, is currently scheduled for oral argument before the Eleventh Circuit sitting *en banc* during the week of October 25, 2004. *See* App., *infra,* 3a.

the Voting Rights Act to Florida's felony disenfranchisement laws is particularly significant because there is substantial evidence that these provisions were originally intended to disenfranchise black voters in Florida. The record in the Florida case also includes evidence of discriminatory practices in the criminal justice system that interact with the state's felony disenfranchisement practices to deny black voters an equal opportunity to participate in the political process. This factual context is relevant to whether Section 2 of the Voting Rights Act applies to these laws.

In addition, the petition in this case should be denied because the order of the court below was interlocutory and no particular circumstances exist that would justify exercise of this Court's jurisdiction to review the question presented at this preliminary stage.

Argument

I. The Question Presented in the Petition Should Not Be Considered Prematurely

The lower courts have not had adequate opportunity to consider the question presented by this petition, whether Section 2 of the Voting Rights Act can be applied to felony disenfranchisement provisions. That very issue is currently pending *en banc* review before the Court of Appeals for the Eleventh Circuit in *Johnson v. Governor of the State of Florida, et al,* No. 02-14469. The Eleventh Circuit has requested the parties in *Johnson* to address several issues, the first of which is exactly the same as the question raised in the petition in this case. In *Johnson,* the Eleventh Circuit

notified the parties that it desires counsel to focus their briefs on six specific questions, including the following:

> Considering the statutory text, congressional intent, Section 2 of the Fourteenth Amendment, and the relevant principles of statutory construction ... does § 2 of the Voting Rights Act (VRA) reach disenfranchisement provisions?

App., *infra,* 1a.

Although the issue is the same, the factual context in which *Johnson* arises is materially different. In *Johnson, amici* have come forward at the summary judgment stage with significant evidence of the original discriminatory intent of Florida's felony disenfranchisement provision. As the Florida district court acknowledged, there is in the record "an abundance" of expert testimony about the original enactment of Florida's felony disenfranchisement scheme including evidence that it was originally adopted for the purpose of keeping blacks from voting. *Johnson v. Bush,* 214 F. Supp. 2d at 1338-39. In addition, in *Johnson, amici* presented substantial evidence of racial discrimination in matters affecting voting in Florida as well as proof that blacks are disproportionately disenfranchised as ex-felons in part because of the way Florida's discretionary law enforcement and criminal justice policies interact with the continuing effects of past official intentional race discrimination. *See Johnson v. Governor of the State of Florida,* 353 F.3d 1287, 1306 (11th Cir. 2003). The proof *amici* presented in *Johnson* goes far beyond unvarnished disparate impact. It combines evidence of the intentionally discriminatory origins of Florida's felony disenfranchisement policy with proof of the policy's ongoing racial effect that cannot be attributed to racial differences in criminal involvement.

Although evidence of intentional discrimination is relevant, albeit not necessary, in assessing the "totality of circumstances" standard under Section 2 of the Voting Rights Act, *see Thornburg v. Gingles,* 478 U.S. 30, 35 (1986), this historical and factual evidence is also important to the determination whether Congress intended Section 2 of the Voting Rights Act to cover felony disenfranchisement and whether it had the constitutional power to do so. This evidence is relevant to Congress' intent because Congress could not have intended a notorious method of disenfranchising minorities to escape the coverage of its most expansive and comprehensive Voting Rights Act. *See Morse v. Republican Party of Virginia,* 517 U.S. 186, 235-236 (1996) (opinion of Breyer, J., joined by O'Connor and Souter, JJ., concurring in judgment).

This evidence is also relevant in assessing Congress' constitutional power because Congress' remedial power to meaningfully enforce the Fifteenth Amendment depends in part on the history of violations of the rights at stake. *See Tennessee v. Lane,* 124 S. Ct. 1978, 1988, 1992-93 (2004) (holding, under the Fourteenth Amendment, that "the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent" and can be assessed "as it applies to [a] class of cases" and not "as an undifferentiated whole"). Any determination limiting the applicability of the Voting Rights Act that does not take into account this evidence of discriminatory purpose and effect will provide scant guidance to states such as Florida that permanently disenfranchise high proportions of their African-American

populations in the context of documented intentional race discrimination in voting.[3]

If this Court is disposed to consider the applicability of Section 2 of the Voting Rights Act to felony disenfranchisement laws, it should await the full factual development in jurisdictions with a historical record "supporting the basic congressional findings that the clear commands of the Fifteenth Amendment had been infringed by various state subterfuges." *Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721, 758 (2003) (Kennedy, J., dissenting) (quoting *Katzenbach v. Morgan,* 384 U.S. 641, 667 (1966)). For it is only in light of such a record that an informed determination can be made concerning the appropriate role of Section 2 in remedying the racial effects of discriminatory felony disenfranchisement laws.

It would be premature to grant certiorari in this case before the Eleventh Circuit has had an opportunity to fully explore the same question in the context of a state that has a demonstrable history of permanently disenfranchising people convicted of felonies in order to keep blacks from voting, a state that is also covered by Section 5 of the Voting Rights Act, and a state that has recently used measures that deny black voters an equal opportunity to

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[3] Because four of the eight states that permanently disenfranchise people with felony convictions are also states that are covered by Section 5 of the Voting Rights Act and therefore are states that previously used literacy tests and other devices to disenfranchise black voters, this factual context is particularly important. The four states are: Alabama, Florida, Mississippi and Virginia. *See* Developments in the Law, *One Person, No Vote: The Laws of Felon Disenfranchisement,* 115 Harv. L. Rev. 1939, 1943 & n. 29 (2002); and 42 U.S.C. § 1973b (b) (required factual determinations to establish coverage under Section 5).

participate in elections.[4] Even in opposing the denial of rehearing en banc in this case, the dissenting Ninth Circuit judges acknowledged that "[i]ntentional discrimination in the criminal justice system, if it interacts with a standard, practice or procedure with respect to voting, could amount to illegal vote denial on account of race." *Farrakhan v. Washington,* 359 F.3d 1116, 1119 (9th Cir. 2004) (Kozinski, J, dissenting from denial of reh'g en banc) (citing *Johnson v. Governor of the State of Florida,* 353 F.3d 1287 (11th Cir. 2003)).

This petition should be denied while this issue continues to be given full and careful examination by the lower courts. As Justice Stevens has explained "[a] series of decisions by the courts of appeals may well provide more meaningful guidance to the bar than an isolated or premature opinion of this Court." *Singleton v. Commissioner of Internal Revenue*, 439 U.S. 940, 945 (1978) (Stevens, J., respecting denial of certiorari); *see also, McCray v. New York,* 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where issue merits further consideration in lower courts).

It is entirely possible that further litigation may produce a clearer delineation of how Section 2 of the Voting Rights Act applies to felony disenfranchisement provisions. The time is not ripe for this Court to resolve

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[4] In addition to the evidence *amici* presented at the summary judgment stage in *Johnson v. Governor of the State of Florida,* there is recent evidence of Florida's continuing use of its felony disenfranchisement laws to conduct purges of legitimate voters that increase the laws' disproportionate impact on black voters, *see, e.g.,* Ford Fessenden, *Florida List for Purge of Voters Proves Flawed,* New York Times, July 10, 2004, and evidence of intimidation of black voters, *see, e.g.,* Bob Herbert, *Suppress the Vote?,* New York Times, August 16, 2004.

this question while the Eleventh Circuit is reviewing the same issue in an importantly different factual situation.

II. The Petition Should be Denied Because the Court of Appeals' Interlocutory Order Merely Remanded the Case for Further Proceedings

The Petitioners are asking this Court to review an interlocutory order that is not a final judgment in the case. There are good reasons here to follow "the Court's normal practice of denying interlocutory review." *Estelle v. Gamble,* 429 U.S. 97, 115 (1976) (Stevens, J. dissenting). *See also Virginia Military Institute v. United States,* 508 U.S. 946 (1993) (Scalia, J., concurring) (denying certiorari before final judgment on fundamental constitutional issue to allow lower court to fully adjudicate claim, including appropriate remedy). First, the trial court has not made factual findings about the impact of Washington State's felony disenfranchisement laws on the ability of black voters to participate in the political process and to elect representatives of their choice which are central to the Section 2 claim. Such findings will assist this Court in determining whether this application of the Voting Rights Act is consistent with Congressional authority. *See South Carolina v. Katzenbach,* 383 U.S. 301, 329-30 (1966). The issue raised in this Petition is not a purely legal issue and therefore a more complete factual record from the lower courts would be useful.

Second, none of the factors that might otherwise suggest exercise of the Court's review at this stage are present here. There is no preliminary injunction that will have immediate consequences for the Petitioners. *See, e.g.,*

Mazurek v. Armstrong, 520 U.S. 968, 975-76 (1997) (grant of certiorari on interlocutory appeal is appropriate where state faces preliminary injunction). The lower court's decision is not patently incorrect. *See Myers v. Bethlehem Corp.,* 303 U.S. 41, 52 (1938) (granting certiorari where decree was clearly improvident). Finally, the Petitioners cannot point to any particular immediate impediment to the administration of justice that requires review at this interlocutory stage. The case raises significant issues that are all the better reviewed after final judgment.

Conclusion

Amici respectfully submit that in light of the Eleventh Circuit's recent grant of rehearing en banc in *Johnson v. Governor of the State of Florida,* and the potential for further helpful factual development by the lower courts in this case, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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APPENDIX

APPENDIX

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

July 30, 2004

TO ALL COUNSEL OF RECORD

Re: No. 02-14469 - Thomas Johnson, et al. v. Governor of the State of Florida, et al.

Dear Counsel:

For the purposes of the upcoming en banc rehearing in the above-referenced case, the court desires for counsel to focus their briefs on the following issues:

1. **Considering the statutory text, congressional intent, Section 2 of the Fourteenth Amendment, and the relevant principles of statutory construction -- with particular attention to those set out in *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 46 S. Ct. 619, 70 L. Ed. 1059 (1926), *City of Rome v. United States*, 446 U.S. 156, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980), *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41,107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987), *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568,108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988), and *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) -- does § 2 of the Voting Rights Act (VRA) reach disenfranchisement provisions?**

2. Assuming § 2 of the VRA reaches disenfranchisement provisions, would Congress have exceeded its enforcement authority under § 2 of the Fifteenth Amendment?

3. What are the differences between the texts of the 1868 disenfranchisement provisions and the 1968 disenfranchisement provision? What is the significance of these differences between the constitutional provisions?

a. Pay particular attention to the fact that the 1868 constitution not only contained a self-executing provision that automatically disenfranchised "any person convicted of felony . . . unless restored to civil rights," Fla. Const. of 1868, art. XIV, § 2, but also included additional language that "[t]he Legislature shall have power and shall enact the necessary laws to [disenfranchise] all persons convicted of bribery, perjury, *larceny*, or of infamous crime," *id.*, art. XIV, § 4 (emphasis added). The 1968 disenfranchisement provision does not contain this additional language. Fla. Const of 1968, art VI, § 4 ("No person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights. . . .").

b. Pay particular attention to the fact that the Fourteenth Amendment contains a blanket prohibition against all state laws that discriminate on the basis of race. Would this

blanket prohibition not trump any state law that so discriminates, and therefore would it not be correct to conclude that even though a state legislature can disenfranchise persons convicted of various crimes, it cannot do so on the basis of race?

4. **As plaintiffs are challenging the current (1968) disenfranchisement provision, if plaintiffs are able to show that the 1868 provision was enacted with racial animus, what effect -- if any at all -- would that showing have in analyzing the validity of the 1968 provision under the first prong of *Hunter v. Underwood*, 471 U.S. 222,105 S. Ct. 1916, 85 L. Ed. 2d 222 (1985), which requires plaintiffs to show race was a substantial or motivating factor behind the challenged provision?**

5. **Assuming the 1868 provision was enacted with racial animus, what must the state of Florida, under *Hunter*, have done in 1968 to be deemed to have enacted a valid disenfranchisement provision?**

6. **In ruling on Florida's motion for summary judgment, did the district court view the evidence and all factual inferences therefrom in the light most favorable to the opposing party, and did the district court resolve all reasonable doubts about the facts in the non-movant's favor?**

Appellant's opening brief shall be filed in the Clerk's Office in Atlanta by 5:00 p.m., Friday, August 27, 2004. Appellee's

opening brief shall be filed in the Clerk's Office in Atlanta by 5:00 p.m., Friday, September 24, 2004. Any reply brief by the Appellants must be filed in the Clerk's Office in Atlanta by 3:00 p.m., Thursday, October 7, 2004. NO EXTENSIONS WILL BE GRANTED. An original and 18 copies of the en banc briefs should be filed (appellant's in blue covers, appellees' in red covers and any reply in gray covers). The parties are expected to insure that all other parties receive a copy of their briefs before the close of business on the day of filing (facsimile, e-mail, etc.). NO TIME FOR MAILING SHALL BE ALLOWED. All parties are also required to upload the brief in electronic format to the court's Web site as described in 11th Cir. R. 31-5.

All counsel are requested to file 16 copies of their opening panel briefs (bound in colored covers), record excerpts and supplemental authorities prior to 5:00, **Friday, August 27, 2004**.

The case will be argued before the Court sitting en banc during the week of October 25, 2004, in Atlanta, Georgia. Counsel will be allotted twenty minutes per side for oral argument. Counsel will receive a calendar notifying of the specific date and time of oral arguments at a later date.

Thank you for your attention to this matter.

Sincerely,

THOMAS K. KAHN, Clerk

By: s/ Matt Davidson
Matt Davidson
Calendar Clerk/Court Sessions Supervisor
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